

CRIMINAL APPEAL No.331 OF 1993

(Against the judgment and order dated 23.09.1993 passed by 1st Additional District & Sessions Judge, Muzaffarpur in Sessions Trial No. 245/88/ 47/90, arising out of Sakra P.S.Case no. 128 of 1986, corresponding to G.R.No. 1471 of 1986.)

BINDESHWAR PASWAN, Son of late Ganpat Paswan, Resident of village-Machhahi, Post-Sakra, P.S.Sakra, District-Muzaffarpur---(Appellant)

Versus

THE STATE OF BIHAR -----(Respondent)

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For the Appellant : Mr. Santosh Kumar Sinha-2, Advocate
-with-
Dr. Vidya Nand Kumar, Advocate.
For the State : Mr. Dasrath Mehta, A.P.P.
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P R E S E N T

THE HON'BLE MR. JUSTICE DHARNIDHAR JHA

Dharnidhar Jha, J.

The solitary appellant, namely, Bindeshwar Paswan was put on trial by framing charge against him under Sections 366 and 376 of the Penal Code in Sessions Trial No.245 of 1988/47 of 1990 and by the judgement and order of conviction passed on 23.9.1993, was convicted by the learned Ist Additional District & Sessions Judge, Muzaffarpur of committing offence under Section 366 of the Penal Code and was directed to suffer rigorous

imprisonment for five years under that Section. The appellant was acquitted of the charge under Section 376 of the Penal Code. The above judgement and order of conviction is being assailed in the present appeal.

2. The occurrence was of the 1st of June, 1986 in respect of which the uncle of the victim namely, Sahela Khatoon @ Mako(P.W.7) filed complaint in the court of Sri K.N.Singh, Judicial Magistrate, Ist Class, Muzaffarpur on 12.6.1986. The copy of the complaint was sent under Section 156(3)Cr.P.C to the police station and on that basis Sakra Police Station Case No.128 of 1986 was recorded by drawing up Ext.4, the FIR. The complaint petition has been marked Ext.1. The investigation was taken up and during that course many witnesses came forward and the victim was also recovered from a house and she was sent to a doctor for being medically examining. Reports of the doctor have been marked Ext-2 and 2/1 respectively. The lady made statement under Section 164 Cr.P.C. and accordingly, the case was sent to trial.

3. The gist of the prosecution case was that the appellant took away the victim, P.W.7,

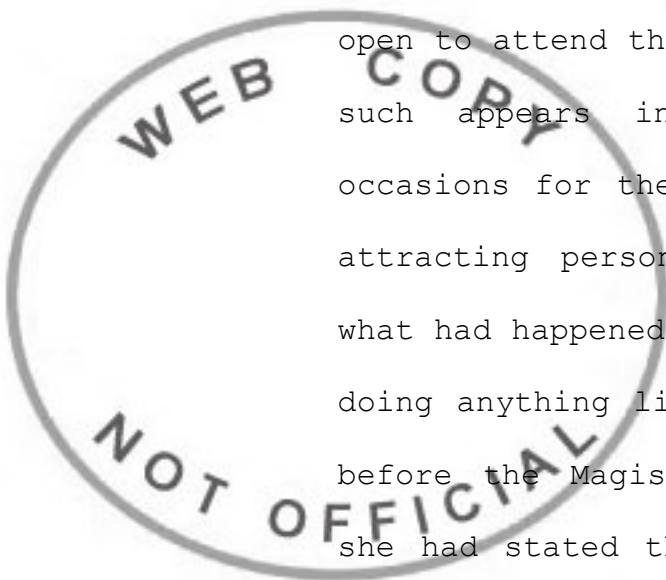
aged about 12-13 years from her house when she was all alone there.

4. The appellant pleaded innocence. Further, he pleaded that the lady had fallen in love with him and she had herself ran away from her house with him.

5. 11 witnesses were examined by the prosecution out of whom P.Ws.1 to 5 were declared hostile. The victim Sahela Khatoon @ Mako was examined as P.W.7 whereas the complainant Abdul Lateef who happened to be her uncle was examined as P.W.6. Budhi Devi the mother of the victim has been examined as P.W.10. The police officer who investigated the case in the main was not examined and another I.O. Ramdhan Pathak was examined as P.W.9 to tell that he took charge of investigation and after examining all the witnesses including the victim and inspecting the place of occurrence sent up the appellant for trial. Dr. Smt. Kumud Roy who examined the victim medically was examined as P.W.8.

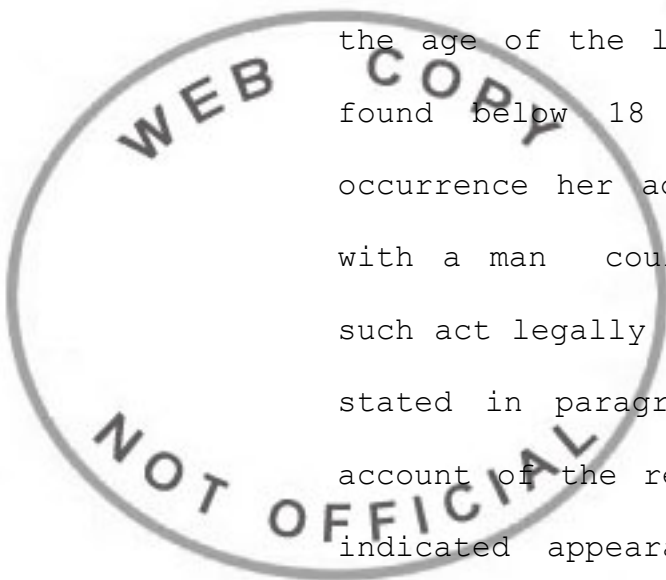
6. The victim P.W.7 stated in her evidence that while she was sleeping in her house the appellant along with another unknown came and gagged her with the help of a towel and by lifting

her took her away, firstly, to Tekhnari and from there to Purnea by train and thereafter to Katihar. In her cross-examination the witness have stated that she was being taken by train to Purnea from Tekhnari and from Purnea to Katihar by bus. During the course of cross-examination the witness expressed her ignorance as to whether there were persons or police personnel all around either on the platform or at the bus stand or at any public place where she was moving with the appellant. She has admitted that she was kept in a house and she used to go out of the house in the open to attend the call of nature. The evidence as such appears indicating that there had been occasions for the victim to raise alarm so as to attracting persons and narrating to them as to what had happened to her. But, she does not appear doing anything like that, rather in her statement before the Magistrate under Section 164 Cr.P.C. she had stated that no one had taken her away. She denied making this statement before the Magistrate under Section 164 Cr.P.C, but that statement appears made by her under Section 164 Cr.P.C which is available on the record of the trial court. She further appears denying making



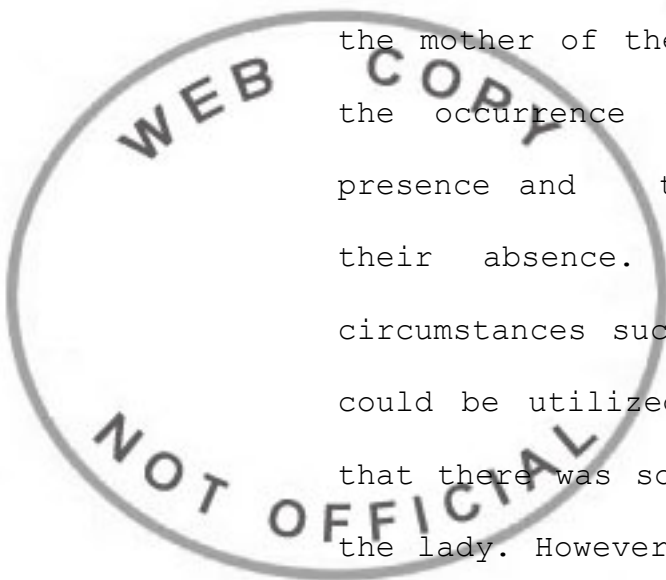
the statement that she had eloped with the appellant on account of love with him which was since last one year and that she was still continuing to love him. But she had stated the facts in her statement under Section 164 Cr.P.C. These facts taken together with the fact that she did not make any attempt to narrate her woes of being kidnapped or being enticed away by any one when she had occasions of doing that, the story of the prosecution that she was really kidnapped with any intention whatsoever pales in doubt.

7. The above finding is dependent upon the age of the lady inasmuch as if she could be found below 18 years of age on the day of occurrence her admission of voluntary elopement with a man could not be enough to countenance such act legally of an accused. Dr. Smt. Kumud Roy stated in paragraph 8 of her evidence that on account of the reading of the X-ray report which indicated appearance of iliac crest, the lady could be 16 years of age. But in cross-examination paragraph 13 she stated that if iliac crest had fused then the lady could be aged somewhere in between 20 to 28 years. The doctor stated that she could not indicate in her report whether epiphysis



had fused. Thus the evidence of the doctor could not be taken for granted to record a finding that the victim could be aged only 16 years on the day of occurrence. Even if she could be 16 years of aged the margin of three years could be added to it and it could be said that she was at the verge of majority and if she was herself eloping with the present petitioner as appears the initial version which appeared in her statement under Section 164 Cr.P.C. then the offence under Section 366 IPC may not be made out.

8. Other witnesses like the complainant or the mother of the victim have simply stated that the occurrence had not taken place in their presence and that the lady was taken away in their absence. Those could be evidence on circumstances succeeding the occurrence and those could be utilized only to reinforce the finding that there was some incident of the kidnapping of the lady. However, when I have held that the lady could be aged somewhere above 18 years and that she could be telling one court or the other that she had herself eloped with the appellant out of love for him, the charge has to fail as regards the conviction of the appellant under Section 366



IPC. The other circumstances in the above behalf I have pointed out while reading the evidence of P.W.7.

9. On consideration of the evidence on record, I find that the judgement and order of conviction recorded against the appellant by the learned Ist Additional District & Sessions Judge, Muzaffarpur was completely erroneous. The material was such on which the appellant ought to have been acquitted. Accordingly, the appellant is acquitted. He is on bail. He shall stand discharged from the liabilities of his bail bond. The appeal is allowed. The judgement and order of conviction is set aside.

(Dharnidhar Jha, J.)

Patna High Court
Dated the 28th
February, 2009
NAFR/B.Kr.

